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No. 99-51

In The

Supreme Court of the United States

CARL T.C. GUITIERREZ and
MADELEINE Z. BORDALLO,

Petitioners,

v.

JOSEPH F. ADA and FELIX P. CAMACHO,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' REPLY TO RESPONDENTS' OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

Citizens of Guam and the other Territories of the United States have little political voice in their governance compared to the citizens of the several States. Accordingly, they are particularly dependent on the federal courts to protect the limited voting rights that Congress has conferred. The Ninth Circuit's decision has seriously damaged the political rights of the citizens of Guam, disregarded or invalidated Guam's applicable election statutes, and gave no respect to the interpretation and application of Guam's election laws by its Election Commission which is charged with their construction and application. This case is accordingly very important not only to the citizens of Guam, but also to the citizens of other Territories of the United States.

I. THE DECISIONS OF NINTH AND THIRD CIRCUITS CONFLICT

The Ninth Circuit specifically acknowledged that its interpretation of the Organic Act of Guam (48 U.S.C. § 1422) is in conflict with the Third Circuit's interpretation of the identical language of the Organic Act of the Virgin Islands (48 U.S.C. § 1591) in *Todman v. Boschulte*, 694 F.2d 939 (3rd Cir. 1982). (App. at p. 15.) The conflict does not disappear because the two Acts relate to gubernatorial elections in two Territories.

The Third Circuit held that ballots entirely blank or blank as to the gubernatorial contest should not be counted in determining the "votes cast" for Governor and Lieutenant Governor. The Ninth Circuit disagreed.

The pivot of the Ninth Circuit opinion is its conclusion that the words "in any election" in the sentence beginning "If no candidates receive a majority of votes cast *in any election*, on the fourteenth day thereafter a runoff election shall be held . . . " [emphasis added] cannot refer solely to the gubernatorial race, but must include all votes cast in the general election because the emphasized words would otherwise be "a nullity." (App. at p. 9) Based on that conclusion, the Court held:

> We read "votes cast" as including all votes cast at the general election for Congress presumably would not have included the phrase "in any election" if it meant to refer only to the votes cast in the single election for governor and lieutenant governor.

(App. at p. 9.)

The opinion ignores two sentences of the statute in the same paragraph dealing solely with gubernatorial elections that make indelibly clear that Congress intended the words "in any election" to mean votes cast in the initial gubernatorial race in a single election *and* gubernatorial votes in general elections held thereafter:

> The first election for Governor and Lieutenant Governor shall be held on November 3, 1970. Thereafter, beginning with the year 1974, the Governor and Lieutenant Governor shall be elected every four years at the general election.

The Ninth Circuit acknowledged that its construction of the statute would lead to results that Congress did not intend. It tried to avoid the "absurdity" of its construction by substituting the words "ballots cast" for the statutory words "votes cast" and by adding the words "in a

general election" to the sentence dealing only with gubernatorial elections. The Court thereby counted as votes cast in the gubernatorial contest during a general election those ballots on which voters had cast votes for both gubernatorial slates and ballots containing a vote for at least one person in some other race which were blank in the gubernatorial contest.[1] The Court stated in Footnote 5:

> Gutierrez argues that this interpretation of § 1422 is absurd because it would require the victor to receive a majority of the sum of all votes cast for all offices voted on at the election. That is, a candidate would have to receive a majority of the approximately one million votes that were cast for all candidates for the various offices. The absurdity of this result suggests that this was not Congress' intent. Our interpretation, however, can give substance to the phrase "in any election" without requiring this result. "Votes cast" does not necessarily mean individual votes cast for particular candidates. For example, a "vote cast" in an election can be equivalent to a ballot cast on which an individual voted for at least one candidate. Admittedly, this interpretation equates "votes cast" with "ballots cast". However, giving effect to the phrase "in any election" in such a way as to

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[1] If ballots are deemed "votes cast" to determine a majority in the gubernatorial race when the voter marked both slates in that race, the Gutierrez slate would still have won the majority. Six hundred nine persons voted for both gubernatorial slates. Counting these "over votes," 304 votes should be added to the vote total of each slate. As thus counted, the Gutierrez slates received a majority of the votes cast in the November 3, 1998 general election.

> avoid an absurdity is preferable to reading the phrase out of the statute entirely.

No "absurdity" and no surplusage exist if the statute is read as Congress wrote it.

Respondents are mistaken in arguing that *Todman* "has lost all vitality." (Resp. Br. p. 5) Federal appellate opinions do not become senile at the age of 17. Respondents are also mistaken that *Todman* misinterpreted *Euwena v. Todman*, 323 F. Supp. 167 (D.V.I. 1972). *Todman* simply agreed with *Euwena's* statement of the principle that "voters not attending the election or not voting on the matters submitted are presumed to assent to the expressed will of those attending and voting." 694 F.2d at 941. (App. at p. 16.)[2] That statement was based on *County of Cass v. Johnston*, 195 U.S. 360 (1877); it cannot be successfully confined, as Respondents contend, to voters who do not go to the polls at all. Like persons who stay home, persons who do not cast a vote in the gubernatorial race have not expressed their will in that contest and are properly presumed to assent to the expressed will of those who voted in the race.[3]

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[2] The *Todman* Court did not imply that *Euwena* "compelled" any conclusion for the obvious reason that district court decisions on legal issues do not bind appellate courts.

[3] Respondents' suggestion that the construction of the language should percolate in lower courts before this Court should decide the issues is incorrect. The issue is now ripe and further litigation would waste scarce judicial resources.

II. THE INTERCIRCUIT CONFLICT AND THE ERRONEOUS NINTH CIRCUIT OPINION WILL BREED LITIGATION

Respondents' argument that nonresolution of the conflict will not breed further litigation assumes that participants in hotly contested political races will be less litigiously inclined later than they are now. The prediction is not founded on experience. Moreover, no appellate conflict on the issues existed until the Ninth Circuit decided this case.

Respectfully submitted,

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